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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 480

WALTER A. EICHEL,

Petitioner,

—against—

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York 17, N. Y.

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The Issue Below

(Supplementing Petitioner's Statement)

The opinion demonstrates that the contested ruling restricted defendant at the trial in presenting evidence on the "issue of Eichel's ability to work." (15a) There was testimony that plaintiff, who had done no work since the accident, could have done work other than as a brakeman, and that he performed various activities. (14-15a)

> "It was defendant's theory that plaintiff was a malingerer . . . Eichel's receipt of the pension payments, which enabled or at least helped him to support himself while not working, not only

tended to increase the probability of defendant's theory that he had deliberately increased his damages, but was an essential link in it; indeed, receipt of the payments had some bearing on the question whether Eichel had received any injury at all in 1960, or was merely feigning one." (19a)

ARGUMENT

POINT I

The issues in the case are essentially factual.

The very careful opinion of Judge Friendly goes into considerable detail as to the evidence at the trial. There is considerable discussion as to just what questions of fact the evidence raised and what the impact of the contested ruling was, not as a general proposition, but in the particular factual context. The eventual finding was that relevance and consequent admissibility was established because of the particular facts produced and the particular arguments that defendant might properly make therefrom. The opinion in the Court of Appeals in this respect follows the argument and the briefs below. The matter was urged on the Court as one of substantial prejudice to the defendant at the trial in the light of the evidence presented, not as a general question of law always and everywhere applicable.

There is thus no question of general interest presented with which this Court can concern itself, but only, in the Court of Appeals, a painstaking, full,

detailed consideration of the factual issues of the particular case resulting in directions for the new trial ordered.

Petitioner here makes a statement that the fact of receipt of disability benefits has no relevance or probative value as to the extent of his injuries. The Court on consideration of the evidence and principally on this basis found otherwise. Its decision is bottomed on the particular evidence produced on the particular issues of this particular trial.

POINT II

No case of conflicting rules between Court of Appeals for different circuits is presented.

The opinion below discusses the cases referred to in the petition and finds that its conclusion is supported by the cases in other circuits (19-21a) rather than in conflict therewith.

Further, the Court of Appeals properly took into account the "railroad's position that the same principle which gives special weight to a jury verdict in F.E.L.A. cases argues against the exclusion of competent evidence that clearly satisfies the basic requirement of relevance." (22a) See *Rogers* v. *Missouri Pacific*, 352 U.S. 500, at 506-507; *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 116 (1963). This Court in these and similar decisions in recent years has severely restricted in F.E.L.A. cases the scope of trial court and appellate supervision of jury verdicts. With the supremacy of the jury verdict and the wide

scope of jury consideration so completely established, common fairness dictates reasonable latitude in the presentation of evidence as a basis for argument to influence that jury verdict within that verdict's encompassing field.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: October 3, 1963
New York 17, N. Y.

Respectfully submitted,

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